

**Consolidated Aluminum Corporation and Aluminum  
Workers International Union, Local No. 215.  
Case 26-CA-8269**

June 3, 1981

**DECISION AND ORDER**

On December 4, 1980, Administrative Law Judge Claude R. Wolfe issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Consolidated Aluminum Corporation, Jackson, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

**DECISION**

**STATEMENT OF THE CASE**

CLAUDE R. WOLFE, Administrative Law Judge: This case<sup>1</sup> was heard before me at Jackson, Tennessee, on June 19, 1980,<sup>2</sup> pursuant to charges timely filed and complaint duly issued. The complaint alleges a threat of legal action for filing charges with the Board and a threat of reprisals for failure to confer with Respondent prior to filing grievances or unfair labor practice charges, both in violation of Section 8(a)(1) of the Act.

The General Counsel, on July 29, 1980, filed a motion to amend the complaint and reopen the record. Thereafter, on August 21 and 25, respectively, Respondent and the General Counsel entered into a stipulation of facts as to the new evidence to be considered, and waived the filing of any amended charge, the introduction of any other evidence, and reopening of the hearing.

<sup>1</sup> This case, originally consolidated with Case 26-CA-8284 for hearing, was severed therefrom by agreement of the parties. The formal documents in Case 26-CA-8284 bound in this record are therefore irrelevant and to be ignored.

<sup>2</sup> All dates are 1980 unless otherwise indicated.

The General Counsel's motion to amend the complaint to allege violations of Section 8(a)(1), (3), and (4) by a refusal to pay Dalton Hawkins pursuant to contractual provision for wages lost through his absence from work while appearing as a witness in this proceeding on June 19, 1980, was granted and the stipulation of facts received in evidence on September 15, 1980. The General Counsel's motion and Respondent's opposition thereto have been placed in the official exhibits file as Administrative Law Judge's Exhibits 1 and 2, respectively.

Upon the entire record,<sup>3</sup> including my observation of the witnesses' demeanor as they testified, and with due regard for the arguments of the parties, I make the following:

**FINDINGS AND CONCLUSIONS**

**I. JURISDICTION**

The complaint alleges, Respondent admits, and I find that Respondent meets both the Board's \$50,000 direct inflow and \$50,000 direct outflow standards for the assertion of jurisdiction.

**II. LABOR ORGANIZATION**

The Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

**III. THE ALLEGED UNFAIR LABOR PRACTICES**

**A. *The Threats by Mario Bognanno***

There is a collective-bargaining agreement between the parties. Dalton Hawkins is the union president and Joel Benson is its vice president. Both are employees of Respondent. At the time of the statements alleged in the complaint, there were grievances and a charge with the Board pending with regard to an employee named King, who was subject to seizures, being required to return to work. This was the second charge filed by the Union against Respondent. The first was dismissed and the second withdrawn.

On January 17, Employee Relations Superintendent Rohret and Hawkins had finished discussing several grievances when Hawkins remarked, "Bognanno has bitten off more than he can handle this time," and "I received my copy of the NLRB charge last Saturday and I know you people must have your copy and you haven't said anything about it, we must really have a case this time." Rohret responded, "Well, we never respond to anything unless we have all the facts and we're gathering the facts." Rohret reported this conversation to Industrial Relations Manager Bognanno, and suggested that it sounded like Hawkins wanted to talk to him.

At about 7:15 a.m. on January 18, Benson called Rohret and advised him that there was imminent danger to King and other employees because King, who had returned to work that morning, was subject to seizures.

<sup>3</sup> Certain errors in the record have been noted and corrected.

Bognanno came to Benson about 9 a.m.<sup>4</sup> and a conversation ensued. Benson testified that Bognanno asked what the imminent danger stuff with King was all about, which Benson then explained. Bognanno, according to Benson, said the Company would check it out and get back to Benson, and then volunteered that the reason Respondent had not mentioned the Board charges was that its legal staff was checking to see whether Respondent had any countercharges on Hawkins. Benson says that he replied that had nothing to do with him, to which Bognanno said he had been told Benson was in the driver's seat. Benson's claimed response was a denial that he was in charge.

Bognanno's version of this conversation is as follows. He told Benson that Rohret had told him there was some question as to why Respondent had not replied to the Board charge. Bognanno explained Respondent's position that the charge was without merit, the matter would be resolved in the grievance procedure, the contract covered the matter, and Respondent was wondering what its legal recourse was. He asked Benson to deliver that message to Hawkins. Benson told him Hawkins was working, and he left to look again for Hawkins. He denies saying anything about Benson being in charge.

After talking to Benson, Bognanno found Hawkins. Hawkins claims that Bognanno told him this was the second time charges had been filed against him; they made him look bad; he was tired of Hawkins filing charges; the next charge might be filed against Hawkins; and he was warning Hawkins to talk things over with him before filing charges.

Bognanno's version is that, after advising Hawkins of the Company's position on the King matter, the two discussed conflicts Hawkins had with other employees on work-related matters, and he told Hawkins he was willing to have off-the-record discussions with Hawkins on grievances before taking formal positions. Bognanno avers he asked why Hawkins filed a charge on the King matter when it was in the grievance procedure, received the answer that it was on attorney's advice, and said no more about it. Bognanno denies warning Hawkins.

On January 22, Bognanno called Benson aside, asked what he had said to Benson on January 18, and, after hearing Benson's version, said that the January 18 conversation was off the record.

#### Conclusions

Considering that Benson and Hawkins were employees of Respondent at the time they testified and thus not likely to deliberately fabricate testimony adverse to the interests of their employer who controlled their work future, and further considering that both gave detailed and believable testimony without any apparent embroidery or evasion, I credit their versions of their respective conversations with Bognanno, who did not appear to me to be testifying as freely and forthrightly as they, with the exception that I believe it most likely and therefore credit Bognanno that he and Hawkins first discussed the King matter. I also note that Hawkins' January 17 com-

ments to Rohret, reported to Bognanno, were not likely to encourage a kindly feeling in Bognanno toward Hawkins, and Bognanno's suggestion to Benson on January 22 that their January 18 conversation be off-the-record suggests some misgivings on his part regarding the prudence of his remarks, as repeated back to him on request by Benson, and a desire to conceal them from others which tends to further corroborate Benson's version of what Bognanno said on January 18.

I conclude and find that Bognanno was irritated by Hawkins' remarks to Rohret and the filing of two charges against Respondent which he considered reflected on him. This is a reasonably probable explanation for his statement to Benson that Respondent was exploring the possibility of charges against Hawkins and his warning to Hawkins of possible charges if Hawkins did not discuss matters with him before filing charges. These statements to Benson and Hawkins were reasonably calculated to interfere with, restrain, and coerce employees in the exercise of their statutory right to file and press charges with the Board and both statements therefore violated Section 8(a)(1) of the Act.<sup>5</sup>

#### *B. The Refusal To Give Witness Pay to Dalton Hawkins*

The parties stipulated the facts are as follows:

1. The following is a clause (art. 18(c)) in a current collective-bargaining agreement between Respondent and the Union:

An employee who is called to Jury service or subpoenaed as a witness in a court of law shall be excused from work for the days on which he serves and he shall receive for each day of Jury service, on which he otherwise would have worked, the difference between eight (8) times his straight-time base hourly rate, exclusive of shift differential, and the payment he receives for Jury service. The employee will present proof of service and of the total amount of money received therefrom. Employees called for Jury service or subpoenaed as a witness in a court of law shall promptly notify the Personnel Department of such call.

2. On or about June 30, 1980, Dalton Hawkins, who testified in this case pursuant to subpoena, requested from Respondent witness fees, pursuant to article 18(c), for appearing in this proceeding.

3. The request of Dalton Hawkins was in accord with procedures required by article 18(c).

4. The request of Dalton Hawkins was denied by Respondent.

The General Counsel contends that the refusal to give Hawkins witness pay is the fruition of Bognanno's statements found hereinabove to be unlawful threats, and was (1) "designed to punish and discourage resort to Board procedures" in violation of Section 8(a)(1) and (4) of the Act, and (2) "punishment for Hawkins' union activities" in violation of Section 8(a)(1) and (3).

<sup>4</sup> I credit Bognanno that he was looking for Hawkins when he found Benson.

<sup>5</sup> I am persuaded the threats were directed at filing charges, not grievances.

Respondent answers that there is no showing of any discriminatory motive for not paying Hawkins, and that "a Board proceeding, or any other Federal or State administrative hearing," is not a "court of law" which accu-  
tuates the witness pay clause of the contract.

I do not agree with the General Counsel that Bognanno's unlawful threats are proof of unlawful motivation in denying Hawkins his regular pay for time lost while appearing as a witness for the General Counsel and against Respondent. Although Bognanno's statements betray an extremely hostile attitude toward Hawkins' conduct in filing charges, I am not persuaded that, without more, a tenable inference can or must be drawn that Bognanno's hostility toward this activity ripened into an intent to deprive Hawkins of pay because he testified adversely to Respondent and thence an actual discriminatory deprivation of the pay. In *Electronic Research II*,<sup>6</sup> the Board found a violation of Section 8(a)(4) and (1) in the denial of a perfect attendance award to an employee who was absent from work in obedience to a Board subpoena, while granting the same award to an employee appearing at the same Board hearing at the respondent's request. Nevertheless, the Board found no violation of the Act by the respondent's failure to pay regular wages for time lost by employees who attended the hearing pursuant to Board subpoena, even though the respondent paid regular wages to the employees it caused to be present at the hearing on its behalf. It is apparent that the Board in *Electronic Research II* did not draw an inference of unlawful discrimination or transferred motivation in the failure to pay wages from the finding of unlawful discrimination in the denial of the perfect attendance award.

The Board's general approach to the type of situation now before me *vis-a-vis* pay by an employer for time lost was stated in *Electronic Research II*, 190 NLRB at 778, as follows:

The earlier unfair labor practice proceeding was an adversary one in which each side subpoenaed or called its own witnesses and compensated them for their time. In these circumstances to order Respondent to pay the employees for time lost from work in testifying against it is to require a litigant in effect to subsidize its opponent. In our view, Section 8(a)(4) was never intended by Congress to impose such burden upon respondent employer.

Inasmuch as the parties stipulated that Hawkins testified pursuant to subpoena, I must conclude that Hawkins was compensated by the General Counsel to the extent of the statutorily required amount. Whether or not he received additional compensation from the Union is not in the record.

The Board further explained its *Electronic Research II* decision in *General Electric Company*<sup>7</sup> as follows:

The Board in reaching opposite results in the two different situations presented in *Electronic Research II* was not drawing a distinction based on any incidental monetary or other disadvantage which might

have resulted. Rather, it was distinguishing between those situations where the employer's actions are directed at the employment relationship, as in the perfect attendance award matter therein, and those where they are not [sic], as in the witness fee situation. In the latter instance, the obligation to pay witness fees is imposed by statute or fiat and not by the employment relationship. Whether summoned by an employer, a union, an individual party, or the General Counsel, the witnesses must be compensated by "the party at whose instance the witnesses appear," and the minimum amount of such compensation is fixed, as here, by the agency under its applicable rule. . . .

The facts in *General Electric*, with respect to the refusal to pay regular wages to employee Borbely who appeared as a witness for the General Counsel pursuant to Board subpoena in an unfair labor practice proceeding where General Electric was the respondent, follow. Borbely received the statutory witness fee, but General Electric refused to pay him the difference between the witness fee and his regular wage for the day he was absent from work to attend the hearing. General Electric did however pay its employee witness Bartko 11 hours' wages. With respect to Borbely it took the position he was not entitled to payment of the difference under the terms of a provision of the collective-bargaining agreement in effect, which is quite similar to article 18(c) in the instant case,<sup>8</sup> because his appearance at an administrative hearing was not at a court proceeding.

The Board, in its *General Electric* decision, found it unnecessary to pass on the contention that an administrative hearing is not a court proceeding, but dismissed the complaint, explaining its rationale as follows, in pertinent part:

. . . In short, no party stands as the guarantor for equal payment to all witnesses summoned by all parties to the proceeding. *A fortiori*, an employer, as here,—or a union in a case not involving an employer as a party—is not as a general proposition obligated to pay opposition witnesses anything in connection with witness fees. Consequently, we conclude that an employer is not discriminating with respect to the employment relationship by not paying an employee called as a witness against it the difference between what such witness would have earned had he worked and what the party calling him as a witness is willing to pay. Nor do we believe that the failure of the employer to pay

<sup>6</sup> General Electric's contract with the union read in pertinent part:  
Jury Duty

1. When an hourly-paid employee is called for service as a juror, he will be paid the difference between the fee he receives for such service and the amount of straighttime earnings lost by him by reason of such service, up to a limit of 8 hours per day.

. . . . .

3. Similar makeup pay . . . will be granted to an employee who loses time from work because of his appearance in court pursuant to proper subpoena . . . . .

<sup>6</sup> *Electronic Research Co.*, 190 NLRB 778 (1971).

<sup>7</sup> 230 NLRB 683, 684-685 (1977).

such difference to employees testifying against it is otherwise *per se* discriminatory . . . . As we have previously stated, to hold that an employer must pay this difference would result in making employer liability dependent on what others are willing to pay, something we are unwilling to do.

On the other hand, the situation is quite different where, apart from the matter of payment of witness fees and/or the amount thereof, the witnesses called by an opposing party are *additionally* denied the benefit of a term or condition of employment with which witnesses called by the employer nevertheless receive . . . . Clearly, in such a situation the employer is penalizing those employees who are summoned to testify by the other side concerning a term and condition of their employment. Consequently, the prospect of being treated in such a disadvantageous manner concerning their employment relationship makes employees reluctant to testify against their employer, or for an opposing party, thereby obstructing the Board's processes irrespective of proof of a discriminatory motive or union animus.

True, in the witness fee situation the disparity in fees created by one party paying its witnesses more than another party is willing, or allowed, to compensate its own, does result in the monetary disadvantage of the latter. But that is not the fault of the higher paying party or within its immediate control. Nor is such a disparity due to actions aimed at the employment relationship. Consequently, whatever similarities superficially appear to exist between the two different situations, result, as we have found, from different obligations, considerations, and motives, and hence in reality are unrelated in application and meaning.

*Thus, in sum, we find that there is nothing unlawful in an employer using the wages of witnesses as the measure of his compensating them for witness fees while not also paying employees called by other parties the difference between witness fees they receive from such parties and what they would have been paid as wages for the time they testified, since the employer's actions are not directed at the employment relationship. However, if an employer distinguishes between its employees in their employment relationship on the basis of whether they were summoned as witnesses by it or by the opposition, it acts unlawfully.*

Accordingly, for all reasons discussed above, we conclude that the principle established by the Board in *Electronic Research II* with respect to the payment of witness fees is dispositive of the issue in the instant case. We therefore find Respondent has not violated the Act and shall dismiss the complaint herein. [Emphasis supplied.]

#### Conclusions

Viewing the facts herein in the light of *General Electric* and *Electronic Research II*,<sup>9</sup> I conclude that Respond-

<sup>9</sup> Cf. *Golden Arrow Dairy*, 194 NLRB 474, 478-479 (1971), for an application of *Electronic Research II* to the payment of election observers.

ent's refusal to pay Hawkins the difference between the fee received from the party at whose instance he appeared as a witness and the wages he would have received had he worked rather than testifying was not an "action aimed at the employment relationship." Moreover, Respondent called no employee witnesses and Hawkins was not "denied the benefit of a term or condition of employment . . . which witnesses called by the employer nevertheless received."<sup>10</sup> Accordingly, I find that the allegation that Dalton Hawkins was unlawfully refused payment for wages lost through his appearance as a witness for the General Counsel before me must be dismissed.<sup>11</sup>

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with reprisals for filing unfair labor practice charges without first consulting with Respondent, Respondent has violated Section 8(a)(1) of the Act.

4. The foregoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not committed any other unfair labor practices alleged in the amended complaint.

Pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>12</sup>

The Respondent, Consolidated Aluminum Corporation, Jackson, Tennessee, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with reprisals because they file unfair labor practice charges without prior consultation with Respondent.

<sup>10</sup> Cf. *Ledford Construction Company, Inc.*, 251 NLRB 1461 (1980), violations of Sec. 8(a)(1), (3), and (4) found where employees were suspended for 1 day because they testified on behalf of the union at a Board hearing; *Western Clinical Laboratory, Inc.*, 225 NLRB 725 (1976), Sec. 8(3), (4), and (1) violated where employee witness, subpoenaed by the General Counsel at Board hearing, was forced to use accrued vacation time when he wanted to take leave without pay; and the finding of 8(a)(4) and (1) violations in *Electronic Research Co.*, 187 NLRB 733 (1971), and *Electronic Research II* consisting of the employer refusing a perfect attendance award to the General Counsel's witnesses while granting such awards to its own employee witnesses.

<sup>11</sup> Like the Board in *General Electric*, I find it unnecessary to pass on Respondent's contention that its refusal to pay Hawkins is valid under art. 18(c) of the collective-bargaining agreement. Whether or not Respondent's interpretation of art. 18(c) is valid is, in my view, an issue that might more appropriately be resolved through the contractual grievance procedure.

<sup>12</sup> In the event no exceptions are filed as provided by Sec. 102.46 of Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Post at its Jackson, Tennessee, facility copies of the attached notice marked "Appendix."<sup>13</sup> Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

<sup>13</sup> In the event this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

WE WILL NOT threaten you with reprisals because you file unfair labor practice charges without prior consultation with us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

CONSOLIDATED ALUMINUM CORPORATION